

file



**Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS**

Application of James A O'Brien for an After-the-Fact Permit to Place Shore Protection Along Lake Michigan, Town of Sevastopol, Door County, Wisconsin

Case No. 3-NE-97-490LL

Investigation on Motion of the Department of Natural Resources of an Alleged Unlawful Construction and Maintenance of a Structure on the Bed of Lake Michigan, Town of Sevastopol, Door County, Wisconsin by James A. O'Brien

Case No. 3-NE-98-0191LL

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On June 25, 1996, James A. O'Brien applied to the Department of Natural Resources (Department) pursuant to sec. 30.12, Stats., for a permit to place rock riprap on the bed of Lake Michigan. The proposed project consisted of placing rock riprap along ninety feet of shoreline on Lake Michigan and an unnamed stream. On August 5, 1996, the Department approved the application with conditions and issued permit 3-LM-96-280 to Mr. O'Brien. Mr. O'Brien did place rocks on the bed of Lake Michigan; however, the Department alleges that the structure constructed and maintained by Mr. O'Brien violates the conditions of the permit.

The Department's Northeast Region staff conducted field investigations and allege that James O'Brien is maintaining a rock groin structure on the bed of Lake Michigan in violation of secs. 30.12 and 30.15, Stats., without a permit from the Department. The Department further alleges that the structure, in its present configuration, interferes with the rights and interest of the public in Lake Michigan. The alleged maintenance of this structure in Lake Michigan in violation of secs. 30.12 and 30.15, Stats., is alleged to be a public nuisance by sec. 30.294, Stats.

On August 18, 1997, Mr. O'Brien submitted a second, after-the-fact permit application to place stone riprap along the shore of Lake Michigan. According to the application, the application is for a permit authorizing the project as it existed as of the date of the application. The Department and Richard Geudtner, a neighbor, oppose the issuance of the after-the-fact permit.

On May 4, 1998, the Department filed a Request for Hearing with the Division of Hearings and Appeals. Pursuant to due notice, a combined hearing on the enforcement action (Case No. 3-NE-98-0191LL) and the application for an after-the-fact permit (Case No. 3-NE-97-490LL) was conducted on June 11, 1998, in Sturgeon Bay, Wisconsin, before Mark J. Kaiser, Administrative Law Judge. The representatives of James O'Brien and Richard Geudtner filed written argument after the hearing. The last submittal was received on June 23, 1998.

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

James A. O'Brien, by

Ann O'Brien (daughter of James O'Brien)
4034 Glidden Drive
Sturgeon Bay, WI 54235

Wisconsin Department of Natural Resources, by

Attorney Peter D. Flaherty
P. O. Box 7921
Madison, WI 53707-7921

Richard Geudtner, by

Attorney James R. Smith
Pinkert, Smith, Weir, Jenkins, Nesbitt, Hauser & Weber
P. O. Box 89
Sturgeon Bay, WI 54235-0089

FINDINGS OF FACT

1. James A. O'Brien, 4034 Glidden Drive, Sturgeon Bay, Wisconsin, 54235, owns real property located in the NW ¼, of the NW ¼ of Section 33, Township 28 North, Range 27 East in the Town of Sevastopol, Door County, Wisconsin. The above-described property abuts Lake Michigan, which is navigable in fact at the project site.

2. An unnamed stream runs along the north side of the O'Brien property and flows into Lake Michigan. This stream forms the boundary between the O'Brien property and that of Richard Geudtner. The unnamed stream is navigable in fact. The mouth of the unnamed stream meanders extensively on the beach of Lake Michigan. The location of the mouth of the stream is impacted by wind and wave action on Lake Michigan. During periods when the mouth of the unnamed stream moves to the south, the stream has caused considerable erosion to the beach in front of the O'Brien property and to the beaches in front of properties south of the O'Brien property.

3. On June 25, 1996, Mr. O'Brien applied to the Department of Natural Resources (Department) for a permit to place rock riprap along the shoreline of Lake Michigan. The Department approved the application with conditions and issued permit No. 3-LM-96-280 on August 5, 1996. The permit authorized the placement of rock riprap fifteen feet high by six feet high extending twelve feet lakeward. As part of the project, Mr. O'Brien caused a single row of boulders to be placed on the bed of Lake Michigan perpendicular to the shoreline of Lake Michigan. The row of boulders extends approximately sixty feet lakeward beyond the ordinary highwater mark of Lake Michigan. The Department alleges this row of boulders constitutes a rock groin and was placed in violation of the conditions of the permit.

4. Finding of Fact No. 2 of the permit provides that "[t]he project will consist of placing rock riprap along ninety feet of shoreline on Lake Michigan and an unnamed stream." The applicant contends that the row of boulders placed perpendicular to the shoreline of Lake Michigan are in fact placed along the bank of the unnamed stream and that this is allowed by the permit. The description of the project in the permit is ambiguous; however, during subsequent conversations and site visits, Department staff clearly advised the applicant that it had intended to permit rock riprap to be placed only parallel to the Lake Michigan shoreline. The Department had not intended to permit the placement of any riprap perpendicular to the Lake Michigan shoreline.

Additionally, although the description of the project in the permit may be ambiguous, the permit explicitly states that it does not allow the relocation of the unnamed stream. This provision should have alerted the applicant that placement of rock rip-rap along the bank of the unnamed stream, the intended purpose of which was to prevent the stream from meandering to the south, was beyond the scope of the permit.

5. On August 18, 1997, Mr. O'Brien (applicant) filed an application for an after-the-fact permit for this structure. The application is essentially the same as the original application. The application indicates that Mr. O'Brien is seeking a permit for the project as it existed at the time of the application. The applicant and the Department have complied with all procedural requirements of sec. 30.02, Stats.

6. The Department alleges that the row of boulders placed perpendicular to the shoreline of Lake Michigan is in fact a rock groin. The purpose of the rock groin is to restrict the flow of the unnamed stream to the south. This restriction reduces the amount of erosion from the stream to the beaches in front of the applicant's property and to the beaches of other properties south of the applicant's property. However, by restricting the flow of the stream to the south, the rock groin also restricts the flood flow capacity of the stream.

7. The rock groin interferes with the free flow of water along this stretch of the shoreline of Lake Michigan. The result of this interference is that additional sand is deposited on the south side of the rock groin and a depletion of sand has occurred directly north of the rock groin, the Geudtner property. Richard Geudtner presented numerous exhibits demonstrating the loss of sand on his beach since the construction of the rock groin. A Department witness characterized this depletion of sand as "beach starvation." The experts who testified at the hearing were unwilling to testify that the loss of sand on the Geudtner beach was solely the result

of the rock groin; however, beach starvation is one of the reasons the Department is generally opposed to the construction of rock groins and jetties.

8. The negative impacts caused by the rock groin are relatively minor; however, the Wisconsin Supreme Court has held that the Department must consider the cumulative impacts of proposed projects. Hixon v. PSC, 32 Wis. 2d 608, 146 N.W. 2d 577 (1966). The cumulative impact of the rock groin when considered with the impact of projects having similar impacts is significant.

9. The rock groin will not adversely affect water quality nor will it increase water pollution in Lake Michigan. The rock groin will not cause environmental pollution as defined in §144.01(3), Stats.

10. The Department has complied with the procedural requirements of sec. 1.11, Stats., and Ch. NR 150, Wis. Admin. Code, regarding assessment of environmental impact.

CONCLUSION OF LAW

1. James A. O'Brien is a riparian owner along Lake Michigan within the meaning of sec. 30.12, Stats.

2. The rock groin Mr. O'Brien has constructed on the bed of Lake Michigan is a structure within the meaning of sec. 30.12, Stats. Accordingly, the rock groin can only be maintained if the Department issues a permit for the structure. The rock groin violates the conditions of permit No. 3-LM-96-280 issued by the Department. The construction and maintenance of the rock groin constitutes a violation of secs. 30.12 and 30.15, Stats.

3. The construction and maintenance of the rock groin in violation of secs. 30.12 and 30.15, Stats., constitutes a public nuisance pursuant to sec. 30.294, Stats.

4. The rock groin is "detrimental to the public interest in navigable water" within the meaning of sec. 30.12(2), Stats.

5. The project is a type III action under sec. NR 150.03(8)(f)4, Wis. Admin. Code. Type III actions do not require the preparation of a formal environmental impact assessment.

6. Pursuant to secs. 30.02, 30.03(4)(a) and 227.43(1)(b), Stats., the Division of Hearings and Appeals has the authority to issue the following order.

ORDER

The after-the-fact permit application submitted by James A. O'Brien is denied. Within ninety days of the date of this order, Mr. O'Brien shall remove the boulders which have been

placed perpendicular to the shoreline of Lake Michigan and beyond (lakeward) twelve feet of the ordinary high water mark of Lake Michigan.

Dated at Madison, Wisconsin on August 10, 1998.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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By: Mark Kaiser
MARK J. KAISER
ADMINISTRATIVE LAW JUDGE

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision

1 Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs 227.52 and 227.53, Stats.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

3 Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.